IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 593

IN THE MATTER OF
THE APPLICATION OF NEW YORK STATE
LABOR RELATIONS BOARD,
Respondent-Appellee,

for an Order
against

TOFFENETTI RESTAURANT COMPANY, INC.,
Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

TEITELBAUM & TEITELBAUM,
40 Exchange Place,
New York City, New York,
ABRAHAM TEITELBAUM,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Petitioner.

ABRAHAM TEITELBAUM,
Of Counsel.

January, 1944.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No......

IN THE MATTER OF

THE APPLICATION OF NEW YORK STATE LABOR RELATIONS BOARD,

Respondent-Appellee,

for an Order

against

TOFFENETTI RESTAURANT COMPANY, INC.,

Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Petitioner, Toffenetti Restaurant Company, Inc., prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals of the State of New York rendered in December, 1943 denying leave to appeal without an opinion from a decision denying leave to appeal to the appellate division from an order made on the 16th day of March, 1943 by Mr. Justice Peter Schmuck of the New York Supreme Court enforcing an order of the Labor Board.

Opinion Below.

The Opinion of Mr. Justice Peter Schmuck of the Supreme Court of the State of New York is set out in Record (303, 306).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (a) and (b) and Section 240 (b) of the Judicial Code as amended by the Act of February 13, 1925, promulgated by this Court adopted February 13, 1939 and amended March 25, 1940, October 21, 1940 and May 26, 1941. The fundamental right of Free Speech is the basis for the Court to take jurisdiction.

Statute Involved.

The Constitution of the State of New York, Article I, Section 8; XIV amendment to the Constitution of the United States; Bill of Rights.

Questions Presented.

Can free speech be curtailed by an Administrative Board in violation of the State and Federal Constitution?

Can an employer be prevented from exercising his right of Freedom of Speech in talking to his employees?

Should not the Court of Appeals of New York, after being presented with the recent decision of the United States Supreme Court involving Freedom of Speech, reverse a matter before it to conform with the opinion of the United States Supreme Court?

Where a Labor Board can award back wages, would the denial of the right to interpose the defense of laches be "a taking of property without due process" under the 14th Amendment of the Federal Constitution?

Can a Labor Board order a Booster Club organized in an establishment as an incentive method to grant bonuses to employees for merit, incentive, promotion of sales and prevention of absenteeism, abolish same without securing a National War Labor Board Directive as provided by the United States Presidential Order No. 9250 known as the Economic Stabilization or Freeze Act?

STATEMENT.

Nature of the Proceedings.

This is an Appeal from an adverse decision in a Labor Board case against Respondent ordering the reinstatement of certain employees with back pay, and other directives. (R. 298-302.)

Pleadings.

The New York State Labor Board filed a petition in the Supreme Court of New York to enforce the Board's Order reinstating certain employees with back pay and making certain findings of facts and conclusions of law. (R. 237-302.)

The cause came on to be heard as a motion before Mr. Justice Peter Schmuck, and after ten minutes hearing, took the matter under advisement and rendered his decision. (R. 303-306.)

The respondent then filed applications for appeals to the Appellate Division and to the Court of Appeals which denied leaves to appeal. All appeals have been taken timely within the statutes permitting appeals.

The affidavits and counter affidavits and intermediate report and Labor Board decisions are set forth in the Record at length.

Locals 16 and 89 of the Hotel and Restaurant Unions filed charges against appellant on the 20th day of August, 1940. Thereafter these charges were amended by said unions from time to time. A consent election for employees was held on December 16, 1940, at which time the employees voted not to be represented by the unions. At the election instead of the two locals being named on the

ballot, the Local Joint Executive Board, an organization with no membership, no charter, which is not a union but merely an organization set up for the supervision of local unions within an area, was set forth as the collective bargaining agent. In all proceedings thereafter both original locals do not appear, and in their stead appears the Local Joint Executive Board. Exceptions to the election were filed late by the unions and were not within the time prescribed by the law. (R. 99.)

The Labor Board did not issue a complaint upon said charges and exceptions until 12 months after the filing of the charges. The complaint was issued August 8, 1941. The appellant filed its answer August 15, 1941, and an amended answer September 3, 1941. The appellant sets forth denials with five separate affirmative defenses. These defenses were stricken out by the Labor Board without permitting the taking of proof under these defenses. Proper exceptions were noted to all such rulings. A second amended answer set forth again the defense of laches in more particular and that defense too was stricken summarily without permitting the introduction of proof, with exception noted. (R. 104-108.)

Facts.

The Toffenetti Restaurant Company, Inc., operated a restaurant in the New York World's Fair during the years 1939 and 1940, employing several hundred employees. On August 6, 1940, The Toffenetti Restaurant Company, Inc., opened another restaurant at 43rd Street and Broadway, New York City, employing over 400 employees. To meet the demands of expected business this restaurant employed a greater number of employees than were needed. (R. 244.) In the months that followed the opening, the restaurant at 43rd Street and Broadway, New York City, was over-

manned, due, firstly, to the closing of the World's Fair on October 27, 1940, which necessitated the employment of the older employees from both establishments into one, and secondly, business did not come up to expectations. (R. 210, 211.) Readjustments by reduction in the number of employees became necessary. Therefore on October 27 to 30, 1940, the date of the closing of the World's Fair Restaurant, many replacements were made. This action, the union contends, resulted in discharging employees for union activities. There were over 400 employees in August, 1940, as against 184 employees on January 30, 1941, which the Trial Examiner finds by the records. (R. 108, 204.)

Immediately upon the opening of the Broadway restaurant the union commenced a reign of terror to organize this restaurant. (R. 209.) The conduct of the union organizers interfered with the ordinary business by flooding the establishment with derogatory literature, slandering the President of the restaurant, threatening employees, inciting arguments with customers and organizing concerted action of sabotage of the food and service for the purpose of intimidating the President of Toffenetti Restaurant Company to enter into a closed shop agreement without consulting the employees as to their choice in having a union of their own choosing as provided by law. The President of the Toffenetti Restaurant Company has always contended and stated that the right to join a union of their own choosing belonged to the employees. (R. 41.)

Picketing was commenced by the Local Joint Executive Board and continued for several months. The unions filed 24 charges with the Labor Board but no complaint was issued for over twelve months, to-wit, August, 1941. (R. 2.) The Secretary of the Labor Board informed counsel for the petitioner herein that he would suggest to the Labor Board not to award back wages in the event of an unfavorable decision due to such delay.

In November, 1940, a consent election was agreed upon to be held in December, 1940, at which time the employees voted not to be represented by the Local Joint Executive Board. (R. 99.)

In March, 1943, another election was ordered by the Labor Board and the employees again reiterated their desire not to be represented by Locals 16 and 89 of said Hotel and Restaurant Union.

The Labor Board ordered reinstatement with back pay for six employees, and for two employees preferential rehiring, and granted other objectionable directives. (R. 298-302.)

The entire record does not sustain the findings of the Labor Board. If the statements of Mr. Toffenetti were examined even more closely, the Supreme Court has decided that the same statements, although not admitted to have been made by him, were within his province to utter under his Constitutional right of free speech. The unions object to the President's statements, before the election, in explaining the ballots, "a vote *yes* was for the union, and *No* was a vote of confidence for me." The Record of the Trial Examiner's intermediate report bears this statement. (R. 257.) The evidence is reported by the Trial Examiner in the Record from page 108.

Specifications of Errors To Be Urged.

The Court of Appeals of the State of New York and the Appellate Division erred:

1. In denying right to appeal the decision of Judge Schmuck because the recent decision of the United States Supreme Court in the American Tube Bending Company in principal is applicable to the case at bar.

2. In permitting a decision to stand which deprives petitioner of property without due process of law.

3. In which petitioner was denied its freedom of speech respecting its employees.

4. In permitting a decision to stand, which Orders would contravene the National War Labor Board Orders by abolishing the Bonus "Booster Club" plan without permission, and subject petitioner to both civil and criminal penalties prescribed under Executive Order No. 9250 of the President of the United States.

5. In not permitting petitioner to interpose defense of laches.

Reasons for Granting the Writ.

1. The Court below has decided an important question of Federal Law, opposite to the decision of the Supreme Court of the United States and inconsistent with the principles established by decisions of this Court.

2. The Lower Court has deprived petitioner of property without due process of law.

3. The Lower Court's decision enforcing the Order of the Labor Board is contrary to the National War Labor Board's rulings under Executive Order No. 9250 of the President of the United States, and would subject petitioner to civil and criminal penalties if enforced.

4. To permit the decision of Judge Schmuck to remain in force would be tantamount to a State Court of original jurisdiction overruling the Supreme Court of the United States.

PROPOSITIONS OF LAW AND AUTHORITIES IN SUPPORT OF ARGUMENT.

I.

Free speech cannot be curtailed by an Administrative Board in violation of the State and Federal Constitutions.

Art. I, Sec. 8, N. Y. State Constitution, Bill of Rights.

Ulster Square Dealer v. *Fowler,* 58 Misc. 325.

Hawthorne v. *Natural Carbonic Gas Co.,* 194 N. Y. 326.

Mutual Film Co. v. *Ohio Ind. Com.,* 215 Fed. 138, Aff'd 236 U. S. 230.

Riley v. *Carter,* 81 S. E. 414.

N. L. R. B. v. *American Tube Bending Co.,* 134 Fed. (2nd) 993, Pet. for Certiorari denied U. S. Supreme Court, October 1943.

II.

The defense of laches is a good and sufficient defense as a matter of law in order to be a bar to the granting of the back wages.

French Republic v. *Saratoga Vichy,* 191 U. S. 427.

U. S. v. *American Bell Telephone Co.,* 167 U. S. 224.

U. S. v. *Des Moines Nov. etc. Co.,* 142 U. S. 510.

U. S. v. *Belne,* 127 U. S. 338.

Maryland v. *Balwin,* 112 U. S. 490.

U. S. v. *Tichener,* 12 Fed. 415.

III.

Denial of the right to interpose the defense of laches where the Labor Board can award back wages would be a violation of the 14th Amendment of the Federal Constitution.

Pritchard v. *Norton*, 106 U. S. 124.
McCann v. *New York*, 166 N. Y. 587.
In re Townsend, 39 N. Y. 171.
Fitzgerald v. *Weidenbeck*, 76 Fed. 695.

IV.

The National Labor Relations Board has refused back pay in cases where there have been laches.

Inland Lime and Stone Co., (1938) 8 N. L. R. B. 944 (9 months delay).
Lansing Co., (1940) 20 N. L. R. B. 434 (9 months delay).
Hummer Mfg. Co., (1939) 17 N. L. R. B. 917 (16 months delay).

V.

A local Joint Executive Board is not a union and cannot bargain for any employees.

See Argument.
Owners and Tenants Electric Co. v. *Trachtenberg*, 286 N. Y. S. 570.

VI.

A system of Bonus payment such as the Booster's Club cannot be abolished by a State Labor Board order without a directive from the National War Labor Board.

National War Labor Board, Executive Order #9250 of the President of the United States.

ARGUMENT.

I.

The argument under Point 1, is of such a nature that it reaches the fundamental rights guaranteed by the United States Constitution to the citizens of every State in the Union. The Judge of the Lower Court who rendered the decision stated the following premise but then reached the wrong conclusion.

> "The claim that the order denied respondent (petitioner herein) the precious right of free speech is the most intriguing and proves momentarily arresting.
>
> "Arguments by an employer directed to his employees are legitimate enough as such *pro tanto* the privilege of free speech protects them; but so far as they disclose his wishes, as they generally do, they have a force independent of persuasion. Therefore the order is entitled to be enforced in full." (R. 303-306.)

The Court used the language of the 2nd Circuit Court of Appeals, which is contrary to the opinions of the 4th, 5th, 6th, 7th, and 9th Circuit Courts of Appeal.

The Supreme Court of the United States in the Ford decision cited herein, held that the employer has the right to exercise his freedom of speech. The Lower Court took the reasoning from the 2nd Circuit Court of Appeals which has since been overruled in principal by the United States Supreme Court.

In the case of *N. L. R. B.* v. *The American Tube Bending Company,* decided by the Fourth Circuit Court of Appeals on April 8, 1943, cited in 134 Fed. (2nd) 993, petition for Certiorari denied by the Supreme Court of the United States in October, 1943, warrants a reversal of the decision in the case at bar.

The Court held that an employer's address or other communication made directly to his employees, which is an expression of the employer's own belief regarding employees' selection of a union as their bargaining agent and an attempt to persuade employees to accept them, comes within the protection of the Constitutional right of "Free Speech" and does not violate the National Labor Relations Act. N. L. R. B. Act, 29 U. S. C. A. p. 151, *et seq.*

The American Tube case is more grievous than the case at bar since the communication was by letter and not by word of mouth. This is only presupposing that the employer, or his agents in the case at bar, made the statements attributed to them; and, even for the sake of argument it is admitted, which it is not, the declaration comes within the Constitutional guarantees of free speech. In two different elections, two and one-half years apart, the employees voted that they did not want to be represented by first, the Local Joint Executive Board, and second, by Local No. 16 and Local No. 89 of Hotel and Restaurant Employees Union.

Freedom of Speech.

The question whether the National Labor Relations Act, as construed by the Board deprives an employer of the right of free speech has been settled in the negative by the United States Supreme Court in the *American Tube Bending Company* case, 44 N. L. R. B. 24 (1942); 4th Circuit Court of Appeals (1943); 134 Fed. 2nd 993, Petition for Certiorari by N. L. R. B. denied by United States Supreme Court (October, 1943). The viewpoint previously was adopted by the Labor Board that any expression of anti-union sentiment, whether of fact or opinion, whether made honestly or not, and whether or not made in connection with otherwise coercive circumstances, would constitute interference with labor's right to organize in violation of

Section 8(1) of the Act, upon the theory that the Employer's dominating position makes his every expression the equivalent of the utilization of force, intimidation or coercion. Citing *Ford Motor Co.*, 14 N. L. R. B. 341, the Board's order in the Ford Motor Company case was reversed. It concerned the employer's right to distribute anti-union literature in 114 F. (2d) 905, C. C. A. 6 (1940), Cert. den. 312 U. S. 689.

By the greater weight of authority and logic, the viewpoint prevails that an honest expression of opinion by an employer is within his Constitutional right of free speech.

The Circuit Courts of Appeal from the 4th, 5th, 6th, 7th, and 9th Circuits also uphold this point of view.

Nebel Knitting Co. v. *N. L. R. B.*, 103 F. (2nd) 594, C. C. A. 4 (1939).

Virginia Ferry Corp. v. *N. L. R. B.*, 101 F. (2nd) 103, C. C. A. 4 (1939).

Kiddie Kover Mfg. Co. v. *N. L. R. B.*, 105 F. (2nd) 179, C. C. A. 6 (1939).

Midland Steel Products Co. v. *N. L. R. B.*, 113 F. (2d) 800 (C. C. A. 6).

Continental Box Co. v. *N. L. R. B.*, 113 F. (2nd) 93, C. C. A. 5 (1940).

Jefferson Electric Co. v. *N. L. R. B.*, 102 F. (2nd) 949, C. C. A. 7 (1939).

N. L. R. B. v. *Falk Co.*, 102 F. (2nd) 383, C. C. A. 7, 308 U. S. 453.

N. L. R. B. v. *Union Pacific Stages*, 99 F. (2nd) 153, C. C. A. 9 (1938).

Thus in *Continental Box Co.* v. *N. L. R. B.* cited *supra*, it appeared that a statement of policy was sent out by the company to the employees which expressed a preference for one union over another. This the Board found was a violation of Section 8(1) of the Act, which forbids

employer interference, restraint or coercion in connection with the rights of employees to organize, form and join labor unions for purposes of collecti-e bargaining. The Circuit Court thought differently, saying:

> "We do not agree with the Board that the statement of policy the company sent out just before the election, in any manner violates the letter or spirit of the Act, or standing alone, is any evidence that the Company was undertaking to interfere with or dominate its employees or any association they would form. The Constitutional right of free speech in regard to labor matters is just as clearly a right of employers as of employees, and if the Act purported to take away this right, it could not stand. The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech." Board's order enforced on other grounds.

In *Midland Steel Products Co.* v. *N. L. R. B.* cited *supra*, reversed 11 N. L. R. B. 1214, the employer was held by the Board to have violated the Act in sending to its employees a letter in which it invited them to confer with it individually, and further informed them that they did not have to join a union. The Court held otherwise, saying:

> "We do not understand that the statute forbids the employer, where he is innocent of coercion, interference or restraint, to suggest individual conferences with his men, nor even to advocate the advantages which grow from individual conferences, nor do we understand that such a suggestion of itself constitutes an element of interference, restraint or coercion. If the Statute contained any such provision a serious question would arise as to whether it violated the First Amendment of the Constitution of the United States, and the Employer's right of free speech."

It has been held by the Circuit Court of Appeals for the 9th Circuit that an employer may express his opinion as to

the disadvantages of belonging to a union, and that he may also state the reasons for his dislike of unions and why employees would be better off if they did not belong to any union.

The United States Supreme Court in the past has laid emphasis upon the necessity for preserving free speech in connection with industrial controversies, citing: *Thornhill* v. *Alabama*, 310 U. S. 88. *Carlson* v. *California*, 310 U. S. 106.

The Circuit Court of Appeals for the 6th Circuit has reiterated its disagreement with the Board's viewpoints on the employer's right to free speech, the Court holding in the Ford Motor Company case that there was nothing improper about the dissemination of literature entitled "Ford Gives Viewpoint on Labor" which disparaged labor unions, notwithstanding that such literature was distributed as part of an anti-union campaign which included assaults on union organizers, discriminatory discharges, and other unfair labor practices. The Court took the view that the modern employee is no longer a docile person capable of being put in fear by the very words of his employer, but on the contrary, since the advent of the National Labor Relations Act and its strict enforcement by the Board,

> "The servant no longer has occasion to fear the master's frown on authority, or threats of discrimination for union activities, express or implied."

See also *The Press Co. Inc.* v. *N. L. R. B.*, 118 F. 2d 537 (1941) Cert. den. 313 U. S. 595.

In *N. L. R. B.* v. *Virginia Electric & Power Co.*, 314 U. S. 469 (1942), the Supreme Court of the United States held that an employer does have the right to free speech in regard to labor matters.

The following speech by a United States Senator is appropriate for repetition herein at this point.

Senator Millard E. Tydings (D., Md.) commemorated the 152d anniversary of the writing of the Bill of Rights into the Constitution today in a broadcast speech. Tydings asserted that the first 10 amendments to the Constitution, known as the Bill of Rights, are "the most precious heritage of the everyday citizen of this country."

"Just as the original Constitution itself set up the framework and gave us the structure for the government of our people, so the first 10 amendments, called the Bill of Rights, interpreted our Constitution, gave it its life blood, its general objective, and the purpose for which that Constitution was originally written and established," Tydings said.

"If we were to strike these 10 amendments from the Constitution of the United States, we would in fact strip our people of the feeling of liberty, and security, and protection, and opportunity which they today enjoy.

"So, on this 152d birthday of the establishment of the Bill of Rights, let us be grateful to those who incorporated them as a part of the supreme law of this land, and as we look around the world, at its tyranny, its tragedy, its terror, and its suffering, we can thank Almighty God that here in this country, even the President and even the Congress cannot, under our Constitution, bring on such tyranny, tragedy, terror and suffering here.

"Let us never willingly give up what brave men for 24 centuries have died on a thousand battlefields to secure for you and me as set forth in this great charter of human liberty we call 'the Bill of Rights.' "

II & III.

The charges as to wrongful discharges of employees were filed with the Labor Board, which did not issue a complaint or any order for hearing until twelve months after filing with the Labor Board. The Labor Board by such dilatory tactics cannot deprive a citizen of his property rights. After delaying the proceedings further by failure

to issue its Order for several more months, an award for back wages for the interim during such delay is unwarranted.

The Board refused to permit the petitioner to interpose this defense of laches which is tantamount to depriving it of property without due process of law. Citing *Pritchard* v. *Norton*, 106 U. S. 124.

IV.

The cases cited in our points and authorities is a precedent for denying back wages where there is an unwarranted delay equivalent to laches. Can a premium be given to the indolent and penalize the vigilant? To do so would only foster dilatory action and hence delay the finality of decisions. Citing *Lansing Co.*, (1940) 20 N. L. R. B. 434.

V.

The Local Joint Executive Board is not a union by the admission of the unions. (R. 108, 109.) Under the doctrine of estoppel the Local Joint Executive Board is a creation of member local unions for its own supervision as provided by the Constitution and by-laws of its own international union. The unions subsequently disregarded the Local Joint Executive Board when it filed for its second election claiming Local No. 16 and Local No. 89 as the bargaining representative for the employees. By such action it is admitted that the Local Joint Executive Board was not a proper party to these proceedings and to the calling of the strike, and the strike itself. The hearing of these charges and all proceedings under its name is a nullity since there is no such legal entity entitled to sue or be sued. (R. 325.) Citing *Owners and Tenant Electric Co.* v. *Trachtenberg*, 286 N. Y. S. 570.

VI.

The Bonus system of the restaurant is the Boosters club. To conform to the Presidential Order No. 9250 Bonus given to employees the previous year as part of wages must also be given the following year. To do otherwise, permission must first be given by the National War Labor Board upon an application known as Form 10. The order provides for criminal and civil penalties for its violation. Hence under what right could the State Labor Board order the discontinuance of the Boosters Club without an appropriate order from the National War Labor Board? We firmly contend its order is void. (R. 298.)

Conclusion.

The important Federal question concerning the Employer's right of Freedom of Speech which has been decided by the Supreme Court of the United States is contrary to the opinion of the Lower Court, and therefore this case is an appropriate one for review by this Court, otherwise a State Court can overrule the Supreme Court.

Therefore, for the other reasons stated herein it is respectfully urged that the petition for Writ of Certiorari be granted towards the end to reverse the decision of the lower Court.

It is further respectfully urged that this Honorable Court grant a stay of the lower Court proceedings pending the disposition of these proceedings.

The fact that respondent filed contempt proceedings without giving petitioner the opportunity and right within the time prescribed by law, to proceed to secure a petition for Writ of Certiorari in this Court, shows to what lengths respondent has gone to deprive petitioner of its rights.

It is therefore urged that according to law, equity and good conscience the decision of the lower court should be reversed.

Respectfully submitted,

TEITELBAUM & TEITELBAUM,
40 Exchange Place,
New York City, New York,
ABRAHAM TEITELBAUM,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Petitioner.

ABRAHAM TEITELBAUM,
Of Counsel.